

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AMEER AKRAM,

Defendant-Appellant.

UNPUBLISHED

September 20, 2007

No. 267730

Wayne Circuit Court

LC No. 05-003404-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEEM AKRAM,

Defendant-Appellant.

No. 267731

Wayne Circuit Court

LC No. 05-003404-03

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

In Docket Nos. 267730 and 267731, defendants, Ameer Akram and Aleem Akram, appeal as of right their bench trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). Each defendant was sentenced to a total of three years' probation. In both cases, we affirm.

Detroit police received numerous complaints of shootings, the sale of narcotics, and loitering in the area of 1927 Highland Street. As a result of the complaints, Officer McKinney established surveillance of the area on January 12, 2005, at approximately 8:30 p.m. Officer McKinney acknowledged that it was dark at the time of her surveillance, but asserted that the available lighting from within the building itself and the street lighting allowed her to observe three individuals in front of that address. The building observed was a four-unit apartment in a residential area. Officer McKinney was watching the scene from approximately sixty feet away and, although she had binoculars with her, she did not need them to view the actions of

defendants. Officer McKinney testified that she saw defendants in front of the apartment building engage in palm-to-palm narcotic transactions with individuals who approached them. However, her opinion regarding narcotic transactions was based on lengthy experience in the narcotics division. Specifically, she saw individuals provide currency to defendants, defendants entered the building and proceeded to the upper left apartment, and defendants returned to the front of the building and passed something back to the alleged buyer. Officer McKinney was unable to see the actual transfer of drugs back to the purported buyer by defendants.

Officer McKinney alerted the arrest team to move in after observing each defendant engage in a purported drug transaction. Officer Stephen Jackson, a member of the narcotics team, exited the van and observed defendant Aleem Akram drop a key and two packets of marijuana to the ground. The officer found that the key fit a silver padlock from the security grate of the upstairs unit in the apartment building. Another packet containing marijuana was found on defendant Aleem's person. There was \$36 in currency also found on defendant Aleem. However, there were no drugs or currency found on defendant Ameer Akram.

Police proceeded to investigate the upstairs apartment unit where defendants were observed after they received currency. Police did not need to break open the door to the apartment when they arrived because the door was open. Packets containing heroin, cocaine, and marijuana were found on a table and a television in the apartment. It was opined that the drugs, in ziplock bags, were packaged for sale and would net approximately \$8 to \$10 per bag depending on the drug for sale. There was a shotgun located between six and eight feet from the drugs.

The defense called one witness, a retired detective sergeant who visited the scene of the alleged drug transactions. His testimony attacked the credibility of Officer McKinney when he opined that there was never a light in the area in question and the actions that she viewed were not visible from her location because of the limited lighting and the angle of her observations.

At the conclusion of the bench trial, the court ruled as follows:

Now, I don't think that this particular building was picked at random. It seems that there had been complaints and they organized a crew to go out and do a raid. And Officer McKinney and her testimony as an 18-year veteran of the Police Department, with nine years, having seen hundreds, as she said, of transactions.

So I would have to infer by the Defense argument that Officer McKinney and a crew of veteran officers randomly decided to frame these three gentlemen, to come in here and lie on them, and that – not only that, but they took the dope out there with them and left it at the apartment.

Now, that is what I'm supposed to assume, but since I wasn't born last night, I can't make that kind of finding.

As a matter of fact, I even said while [Officer McKinney] was testifying, if this case depended on her testimony, I would have – I would have rendered a directed verdict at that time. She never saw anybody selling dope to anybody.

She said she saw someone hand somebody some currency, someone go into an apartment and come back and hand something to someone.

They didn't stop the buyer because they weren't interested in the buyer. They were interested in the seller.

She then gave information to the officers who went inside. And these officers' testimony has been completely ignored. Officer McKinney didn't find anything. She didn't take any money from anybody. She never testified about a gun. All she did was transfer some information to some officers, who made the raid.

Now suppose Officer McKinney had not been involved in this situation at all, she hadn't even come in here and testified, and those other officers had gone into this place and arrested someone. Even taking her testimony out of it completely, they found stuff in the apartment. They had a right to be there.

The testimony was that this is an abandoned building, that no one live there. [Defense counsel] even argued that they were there to buy something, which indicates that they had no right to be there. They never said they had a right to be there; therefore, they had no right of privacy in that apartment.

The officers were inside, they found narcotics. The testimony was that it was packaged in such a way to indicate that they were packaged for sale.

Now, sale, intent can be determined by circumstantial evidence. You take the amount of dope that was in there and the way it was packaged. It can be inferred from that evidence that this was packaged for possession with intent to deliver.

Now, the fact that all three of these gentlemen were in there, aiding and abetting each other, in the packaging and the distribution of dope indicates that they were all involved in it; in for a penny, in for a pound.

So, according to the officer's testimony, which – which is being attacked, that she saw three people doing this, I'm stating in my opinion that that doesn't make any difference. All three of them were in there. And I know that people who run dope houses don't have company over to act as disinterested witnesses.

This apartment was the one that was vacant. I don't care about that other one next door. There was no one living in this, because according to the officer's testimony, it was unfurnished, it was smelly in there, it was – there was no furniture. And I know from my experience that this kind of place is used for the sale of narcotics.

So from the – totally ignoring what Officer McKinney said, and I accept her testimony, the other officers found it, they found dope, they found packages,

they found money, they found a key and they found a lock that – the key that fit the lock. They found all of that. That’s not in dispute.

Now, the Defendants can all be found guilty of aiding and abetting in the possession for distribution of cocaine and heroin.

However, you – it has not been fully established who was in possession of the firearm. You cannot aid and abet in a possession of a felony firearm; there has to be definitely one person who was in possession.

Or if there are three people, you have to show that all three in possession, but can’t establish that by aiding and abetting.

And so far no one has been seen to have been in possession. I can’t infer one or the other.

On appeal, defendants argue that there was insufficient evidence to convict them of the crimes charged. However, both defendants contest the sufficiency of the evidence only with regard to the possession element of each crime.

When reviewing a claim of insufficient evidence, this Court reviews the record de novo. See *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). In determining whether the prosecution has presented sufficient evidence to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In a bench trial, the credibility of the witnesses presents an issue for the trier of fact, and we do not resolve the issue anew. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). However, when we review the trial court’s factual findings, we determine whether the trial court correctly applied the facts to the law. *Id.*

To convict a defendant of possession with intent to deliver a controlled substance, the prosecution must prove: (1) that the substance was a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005); MCL 333.7401(2)(a)(iv). Again, the only challenge to the elements of the convicted offenses is the possession requirement.

Possession of narcotics may be actual or constructive, joint or exclusive. *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005). Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the controlled substance. *Id.* A person’s presence at a location where drugs are found is alone insufficient to prove that he constructively possessed the drugs. *People v Echavarria*, 233 Mich App 356, 370; 592 NW2d 737 (1999). Instead, some additional connection between the defendant and the contraband must be shown. *Id.* Proof of possession of a controlled substance requires a showing of dominion or right of control over the drug with knowledge of its presence and character. *Meshell*, *supra* at 621.

In *People v Wolfe*, 440 Mich 508, 511-512; 489 NW2d 748, amended 441 Mich 1201 (1992), the defendant was arrested after an undercover officer made a controlled purchase of crack cocaine at a second floor apartment. When a search warrant was executed on the premises, six individuals were found with cocaine packaged for individual sale and a shotgun. The apartment contained only a couch, refrigerator, and a broken television. There was no functioning toilet, but the bathtub was filled with excrement. The defendant was arrested with \$265 in cash including the marked funds used in the undercover purchase. The defendant also had a beeper and a key to the back door of the apartment.

The defendant testified that he was merely entertaining friends at the apartment, but he was nonetheless convicted of possession with intent to deliver less than fifty grams of cocaine. His challenge to the sufficiency of the evidence to support his conviction was rejected by the Supreme Court:

A person need not have actual physical possession of a controlled substance to be guilty of possessing it. Possession may be either actual or constructive. Likewise, possession may be found even when the defendant is not the owner of recovered narcotics. Moreover, possession may be joint, with more than one person actually or constructively possessing a controlled substance.

In this case, there was no direct evidence that defendant Wolfe actually possessed the cocaine. Rather, the evidence produced at trial showed that he constructively possessed the cocaine, i.e., that he “had the right to exercise control of the cocaine and knew that it was present.” The courts have frequently addressed the concept of constructive possession and the link between a defendant and narcotics that must be shown to establish constructive possession. It is well established that a person’s presence, by itself, at a location where drugs are found is insufficient to prove constructive possession. Instead, some additional connection between the defendant and the contraband must be shown.

Any one of various factors may be sufficient under given circumstances to establish this connection. For example, constructive possession of cocaine was shown ... where, in addition to the defendant’s presence at the location where the cocaine was found, traces of cocaine were discovered on shirts stored in his pickup truck. ... [C]onstructive possession was shown where the defendant was found in a sparsely furnished apartment that contained cocaine packets and large sums of money lying about in plain view. ... [C]onstructive possession of cocaine was established when the defendant drove a codefendant to a location where cocaine was being processed and then remained at that location despite the obvious and nauseating smell of ether, which is an integral component in the processing of cocaine. As these cases suggest, constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband. [*Wolfe, supra* at 520-521 (citations omitted).]

The *Wolfe* Court upheld the conviction of defendant for possession with intent to deliver less than fifty grams of cocaine even though the case was circumstantial, concluding that “[p]ossession with intent to deliver can be established by circumstantial evidence and reasonable

inferences arising from that evidence, just as it can be established by direct evidence.” *Id.* at 526.

Viewing the evidence in the light most favorable to the prosecution, both Ameer and Aleem were seen conducting suspected drug transactions outside an apartment building. At different times, each was approached by a suspected buyer while standing outside of the building, and, after a brief conversation, was seen entering the building, going into the same apartment on the second floor, and returning with suspected narcotics. Police later raided the sparsely furnished apartment and found marijuana, heroin, and cocaine. Case law provides that possession may be found even if the defendant is not the owner of the recovered narcotics and possession may be joint. *Wolfe, supra*. Consequently, the fact that defendants were not found in the room with the drugs does not hinder the sufficiency of the proofs with regard to the possession requirement.

Accordingly, the trial court properly convicted defendant Aleem Akram in light of the proofs that established that he dropped packets of drugs when police pulled up in front of the building to arrest the men, had a packet of drugs on his person, and had a key to the upstairs residence where more drugs were discovered and packaged for sale even though it was open at the time of the raid.

We note that the conviction with regard to defendant Ameer Akram presents a different question where he was not apprehended with any drugs or cash on his person. Therefore, the only evidence against this defendant was the testimony of Officer McKinney wherein she opined based on her observations and experience, that he was engaging in hand to hand narcotics transactions. However, his conviction was premised on an aiding and abetting theory. An aider and abettor may be convicted and punished as if he directly committed the offense. MCL 767.39; *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). A conviction of aiding and abetting may be established when the prosecutor proves: (1) the crime charged was committed by the defendant or another person; (2) the defendant performed the acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time aid and encouragement was given. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). Defendant Ameer does not dispute the elements to support a conviction based on an aiding and abetting theory.¹

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

¹ Reliance on the decision in *People v Lewis*, 178 Mich App 464; 444 NW2d 194 (1989), is misplaced because it is not binding precedent where it was decided prior to 1990. MCR 7.215(J)(1).